No. 75-828

In the Supreme Court of the United States

OCTOBER TERM, 1975

DEMETRIA MOSES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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Petitioners contend that D.C. Code §22-2701 (1973 ed.), making it a criminal offense to solicit for prostitution, is unconstitutional on its face and as applied.

Following a pretrial hearing in the Superior Court of the District of Columbia, the court granted petitioners' motions to dismiss the informations charging them with soliciting for prostitution in violation of D.C. Code §22-2701,[1] on the

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[1]D.C. Code §22-2701 provides that:

> It shall not be lawful for any person to invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading, any person or persons sixteen years of age or over in the District of Columbia, for the purpose of prostitution, or any other immoral or lewd purpose, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both.

grounds that the statute is unconstitutional on its face and as applied (Pet. App. D). The District of Columbia Court of Appeals reversed and remanded the cases to the Superior Court with directions that the informations be reinstated. 339 A.2d 46 (Pet. App. A).

The record below, consisting of a 45-page transcript of the April 25, 1972 pretrial hearing, does not indicate the circumstances under which petitioners were arrested for soliciting for prostitution. The sole witness was Lieutenant George F. Richards of the Prostitution and Morals Division of the Metropolitan Police Department, who testified that each police district has its own vice squad that is responsible for enforcing the statute in question, and that, although the Morals Division was not then employing female undercover officers in its enforcement of the statute, one of the police districts did have such a program (Tr. 5, 23).

1. There is no occasion for this Court to review this case in its present posture. The court of appeals has reversed the Superior Court's ruling that D.C. Code §22-2701 is unconstitutional on its face and as applied, and has remanded the cases with directions that the informations be reinstated; petitioners therefore are in the same position they would have been in had their motions been denied by the Superior Court in the first instance, which rulings would not have been subject to interlocutory appeal (*Di Bella* v. *United States*, 369 U.S. 121, 124-126; *Cobbledick* v. *United States*, 309 U.S. 323, 325-326). Petitioners will have an opportunity to raise their constitutional claims on appeal should they be convicted, and the facts underlying the constitutional issues they raise will have been sharpened and focused.

2. In any event, the District of Columbia Court of Appeals properly rejected petitioners' constitutional claims.

a. Petitioners contend that D.C. Code §22-2701 violates the First Amendment because an offer to engage in prostitution is constitutionally protected speech.

The act of soliciting for prostitution, however, lies outside the normal protection given speech, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484. As the court of appeals observed, solicitation for prostitution involves a purely commercial venture (Pet. App. A. 9-A.10).[2] As such, it is subject "to reasonable regulation that serves a legitimate public interest." *Bigelow* v. *Virginia*, 421 U.S. 809, 826.

The D.C. solicitation-for-prostitution statute serves a legitimate public interest. While the D.C. Code does not prohibit prostitution *per se*,[3] it does proscribe adultery, fornication, incest, and sodomy (D.C. Code §§22-301, 22-1002, 22-1901, and 22-3502 (1973 ed.), respectively). Since prostitution necessarily entails one or more of these acts, solicitations for prostitution properly may be proscribed as a rational method of prohibiting these crim-

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[2]Accordingly, this case differs from *Bigelow* v. *Virginia*, 421 U.S. 809, where the advertisement in question "did more than simply propose a commercial transaction" (*id.* at 822). See also, *New York Times Co.* v. *Sullivan*, 376 U.S. 254.

[3]That the statutory scheme does not prohibit prostitution *per se* is no argument against Congress' power to eliminate the act of solicitation. Cf. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 151; *Capital Broadcasting Company* v. *Mitchell*, 333 F. Supp. 582 (D.D.C.), affirmed, 405 U.S. 1000 (sustaining statutory ban on cigarette advertising on the air waves).

inal acts. Moreover, there is a legitimate public interest in maintaining the quality of community life, which may be affected adversely by public solicitation for prostitution.[4] As this Court stated in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 63:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

b. Contrary to petitioners' further contention, the statute does not violate petitioners' constitutional right to privacy. The right to privacy has been held to encompass and protect only "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." *Paris Adult Theatre I, supra,* 413 U. S. at 65. *A fortiori* it does not protect public solicitation for prostitution. Moreover, this Court consistently has declined to recognize an unlimited right to do with one's body as one pleases. *Roe* v. *Wade*, 410 U.S. 113, 154.

c. Petitioners contend that the statute is applied solely against women, in violation of the Equal Protection Clause of the Fifth Amendment. As the court of appeals noted,

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[4]As this Court stated in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388: "[w]e have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."

however, "the trial court's finding of discriminatory enforcement is unsupported by the record" (Pet. App. A. 17). The only testimony in the record on this point is that of Lieutenant Richards who testified that, while the Morals Division was not then employing female undercover officers in its enforcement of the solicitation statute, another police district did have such a program (Tr. 5, 23).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]Petitioners also contend that the statute is unconstitutionally vague and overbroad. Since petitioners did not raise this contention below, this Court need not review it. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16. In any event, there is no basis for this allegation. The statute embraces a clear range of constitutionally proscribable conduct, and its potential overbreadth is insubstantial in relation to its unquestionably valid scope. See *Parker* v. *Levy*, 417 U.S. 733, 760. Moreover, its words convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo*, 332 U.S. 1, 8; see *Hawkins* v. *United States*, 105 A.2d 250, 252 (D.C. Mun. App.).